United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANTS

United States Court of Appeals
For the
District of Columbia Circuit
FILED OCT 12 1960
Joseph W. Stewart
CLERK

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Leonard N. Bebchick, and
Leonard S. Goodman

Appellants

vs.

Public Utilities Commission of
the District of Columbia, and
D. C. Transit System, Inc.

Appellees

No. 15,999

404

APPEAL FROM AN ORDER OF THE

UNITED STATES DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

Leonard N. Bebchick
Suite 400
1632 K Street, N. W.
Washington 6, D. C.

Leonard S. Goodman
4336 River Road, N. W.
Washington 16, D. C.

Attorneys pro se

QUESTIONS PRESENTED

1. Was the issue of appellants' capacity to sue properly before the Court where the Answer did not contain a specific negative averment of such capacity and the issue was first raised in a Motion to Dismiss the Complaint filed subsequent to the Answer?

2. Did the District Court possess a jurisdiction independent of the record before the Commission to determine appellants' capacity to sue pursuant to their statutory right of appeal?

3. If the District Court possessed such independent jurisdiction, did it err in failing to consider all evidence before it relevant to appellants' capacity to sue and in finding that appellants did not possess requisite capacity to sue?

4. Even if this Court should find that the jurisdiction of the Court below to determine appellants' capacity to sue was limited solely to the record before the Commission, did the Court below err in finding that there was no evidence of record to support appellants' allegation that they are transit riders and thus possess capacity to sue? More particularly --

   a. Did not an affidavit by appellant Goodman in an interlocutory matter before the Commission stating that he is a transit commuter constitute evidence as to that fact?

   b. Did not the disposition on the merits by the Commission of interlocutory motions to intervene and for reconsideration necessarily constitute an implicit finding of appellants' status as transit riders and as "persons affected" by the Commission's order, which were binding upon the Court below, when appellants, as movants, alleged that they were transit riders?

5. Did the Court below err in failing to remand appellants' suit to the Commission for further evidence or findings once it found that evidence of appellauts' capacity to sue must appear in the Commission record and that such record contained no such evidence?

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Leonard N. Bebchick, and
Leonard S. Goodman

Appellants

vs.

Public Utilities Commission of
the District of Columbia, and
D. C. Transit System, Inc.

Appellees

No. 15,999

BRIEF OF APPELLANTS

SUBJECT INDEX

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

STATUTES INVOLVED 4

STATEMENT OF POINTS 4

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE COURT BELOW ERRED IN GRANTING THE COMMISSION'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF CAPACITY TO SUE AND IN FAILING TO STRIKE OR DENY THE MOTION, SINCE THIS MOTION WAS NOT PROPERLY BEFORE THE COURT UNDER RULES 9 AND 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE 7

II. THE COURT BELOW ERRED IN FAILING TO EXERCISE JURISDICTION INDEPENDENT OF THE RECORD BEFORE THE COMMISSION AND TO CONSIDER ALL RELEVANT EVIDENCE BEFORE IT RELATING TO APPELLANTS' STANDING OR CAPACITY TO APPEAL. 10

a. Capacity to sue requires an independent and exclusive judicial determination and cannot properly be treated with the limited judicial scrutiny rendered administrative determinations. 10

b. The requirement that administrative remedies be exhausted cannot be taken to mean that evidence of capacity to sue must be presented to the Commission 11

c. The Court must consider and rule upon all evidence before it relating to standing or capacity to sue. 17

III. THE COURT BELOW ERRED EVEN IF WE ASSUME ITS JURISDICTION TO DETERMINE APPELLANTS' CAPACITY TO SUE IS LIMITED SOLELY TO THE RECORD BEFORE THE COMMISSION 18

a. The Court erred in failing to find from the evidence before the Commission that appellant Leonard S. Goodman is a commuter and hence has standing or capacity to appeal 18

b. The Court erred in failing to follow the Commission's implicit findings and in turn to find that appellants were transit riders and thus had the requisite standing or capacity to appeal 21

IV. EVEN ASSUMING THE COURT SHOULD NOT SUSTAIN ANY OF APPELLANTS' FOREGOING ALLEGATIONS OF ERROR, THE COURT NEVERTHELESS ERRED IN DISMISSING AND IN FAILING TO REMAND THE CAUSE TO THE COMMISSION FOR FURTHER FINDINGS AS TO APPELLANTS' STATUS AS TRANSIT RIDERS. 23

CONCLUSION 24

APPENDIX 26

CASES

Banking and Trading Corp. v. Reconstruction Finance Corp., 15 F.R.D. 360 (S.D. N.Y. 1954) 8

Bowles v. Beatrice Creamery Co., 146 F.2d 774, 780 (10th Cir. 1944) 18

Chemacid, S. A. v. Ferrotar Corporation, 3 F.R.D. 45 (S.D.N.Y. 1942) 8

Hollis v. Kutz, 255 U. S. 452, 454, 41 S. Ct. 371 (1921) 13, 14, 15, 16

Hollis v. Kutz, 49 App. D. C. 301, 265 F. 451, 452 (1920) 13,14

Jones v. Schellenberger, 196 F. 2d 852 (7th Cir. 1952) 8

Land v. Dollar, 330 U. S. 731, 735, 67 S. Ct. 1009 (1947) 17

McComb v. Utica Knitting Co., 164 F.2d 670, 674 (2d Cir. 1947) 18

Mechanical Appliance Company v. Castleman, 215 U. S. 437, 30 S. Ct. 125 (1910) 17

Pacific States Box & Basket Co. v. White, 296 U. S. 176, 185, 56 S. Ct. 159 (1935) 23

Pollak v. Public Utilities Commission of the District of Columbia, 89 App. D. C. 94, 191 F. 2d 450 (1951), reversed on other grounds, 343 U. S. 451, 72 S. Ct. 813 (1952) . . 14, 17, 18

Thompson v. Consolidated Gas Co., 300 U. S. 55, 69, 57 S. Ct. 364 (1937) 23

United States v. Public Utilities Commission of the District of Columbia, 80 App. D. C. 227, 151 F. 2d 609 (1945) 14, 16, 17

United States v. Rock Royal Co-op, 307 U. S. 533, 567-68, 59 S. Ct. 993 (1939) 23

Virginia Petroleum Jobbers Assn. v. Federal Power Commission, 104 App. D. C. 106, 259 F. 2d 921 (1958) 16

Wetmore v. Rymer, 169 U. S. 115, 18 S. Ct. 293 (1898) 17

Yankee Network v. Federal Communications Commission, 71 App. D. C. 11, 107 F. 2d 212, 217 (1939) 13

STATUTES

Act of March 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 65, as amended August 27, 1935, 49 Stat. 882, ch. 742, § 2, D. C. Code, Title 43, §43-705. . . . . 1, 4, 7, 10, 11, 12, 15, 24, Appendix

Act of March 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 66, as amended August 27, 1935, 49 Stat. 883, ch. 742, § 2, D. C. Code, Title 43, § 43-706 . . . . . 4, Appendix

Act of September 15, 1960, 74 Stat. 1031 15

Act of March 3, 1901, 31 Stat. 1280, ch. 854, §568, as amended June 30, 1902, 32 Stat. 533, ch. 1329, D. C. Code, Title 1, §1-511 20

Act of December 15, 1926, 44 Stat. 921, ch. 8, §3, D. C. Code, Title 43, §43-205, as amended by Reorganization Plan No. 5 of 1952, 66 Stat. 824, §2(b), D. C. Code, Title 1, Appendix. 16

RULES

Federal Rules of Civil Procedure
Rule 9 . . . . . 5, 7, 8
Rule 12 . . . . . 5, 7, 8
Rule 43 17
Rule 56 20

Rules of Practice of the Public Utilities Commission of the District of Columbia
Rule 7 . . . . . 21, 22
Rule 12 20
Rule 14 22

TREATISES

2 Davis, Administrative Law Treatise, §16.07, page 456 (1958) 23
6 Moore's Federal Practice (2d ed. 1948) §56.11[3] 20
1 Wigmore, Evidence (3d ed. 1940) §4 19
1 Wigmore, Evidence (3d ed. 1940) §4a et seq. 20
4 Wigmore, Evidence (ed ed. 1940) §1709 19

STATEMENT OF JURISDICTION

The jurisdiction of this Court and of the Court below is founded upon the provisions of the Act of March 4, 1913, 37 Stat. 989, ch. 150, §8, par. 65; as amended by Act of August 27, 1935, 49 Stat. 882, ch. 742, §2; District of Columbia Code, Title 43 Section 705. The factual basis of the jurisdiction of the Court below is set forth in paragraphs I and II of appellants' Complaint filed 20 May 1960 (JA 10). The factual basis of the jurisdiction of this Court is set forth in appellants' Notice of Appeal (JA 20). The foregoing Act is set forth in the Appendix hereto and is hereinafter "Section 43-705."

STATEMENT OF THE CASE

On November 9, 1960, the Public Utilities Commission of the District of Columbia ("Commission") suspended a fare increase proposed and filed by D. C. Transit System, Inc. ("Transit") for application in the District of Columbia, and ordered an investigation. Transit proposed to increase the then existing 20¢ cash fare charged its customers in the District of Columbia to 25¢ during specified "rush hours." Appellant Leonard S. Goodman and five other persons petitioned the Commission on November 12, 1960, for leave to intervene individually as parties in the proceeding (JA 3-5) on the basis of an affidavit that they were regular commuters using the facilities of Transit and thus had a "substantial interest" in Transit's proposed fare increase and in the Commission's investigation (JA 5). The Commission by Order 4592 of November 19, 1959, granted intervention to these six individuals, including appellant Goodman, upon a finding that upon "the allegations contained therein and the affidavit attached thereto, the Commission has concluded that the substantial interest contemplated by Rule 7.1 of the Commission is present and the petition to intervene should be granted" (JA 6). Rule 7.1 provides that

any person having a "substantial interest" in the proceeding may intervene (JA 1).

Appellant Goodman participated actively in all phases of the Commission's investigation, appearing as attorney pro se, as counsel for the Friendship Citizens Association and as co-counsel for the other five individual intervenors, known collectively as "Public Petitioners." In representing the interests of himself and his clients, appellant Goodman cross-examined the witnesses of the Commission and Transit and sponsored two expert witnesses who testified at length and introduced numerous economic exhibits and studies relating to the rate of return, rate base, operating expenses, and other matters relating to the fare proposal under investigation. On January 25, 1960, appellant Leonard N. Bebchick entered his appearance as co-counsel for Public Petitioners. Upon the conclusion of the hearings, the Commission rejected Transit's fare proposal but found that a fare increase of cash fares from 20¢ to 25¢ during all hours, coupled with a token fare of five tokens for $1.00 was reasonable. Immediately upon the issuance of the Commission's order, Transit filed a tariff embodying these findings of the Commission, and the new fare schedule became effective on 6 March 1960.

Appellant Goodman and appellant Bebchick, in their individual capacities, along with numerous other persons and groups, petitioned the Commission for reconsideration of its Order as being contrary to and without substantial evidence and otherwise unlawful (JA 6-7). Appellants alleged that they were transit riders and were thus "affected" by the Commission's Order (JA 7). The Commission denied appellants' petition for reconsideration on the merits (JA 7-9).

Whereupon, Appellants, with three other individuals, on May 20, 1960, filed a complaint in the United States District Court for the District of Columbia pursuant to Section 43-705 of

the District of Columbia Code alleging that the Commission Order was unlawful and praying that it be vacated (JA 10). In paragraph II of their complaint, Appellants alleged that they "are individuals who ride the regularly scheduled vehicles of Transit from place to place in the District of Columbia . . ." (JA 10). Transit and the Commission, party defendants in Appellants' suit, answered the complaint stating in relevant part that they were "without knowledge or information sufficient to form a belief as to the truth" of this allegation by plaintiff (JA 15 and 16).

On June 25, 1960, Appellants moved for summary judgment on the merits of their complaint (JA 9). Thereafter, on August 25, 1960, the Commission moved to dismiss the complaint on the grounds that Appellants lacked capacity to sue and that their complaint failed to state a cause of action. (JA 9, 17).

The cause came on for hearing before the Hon. F. Dickinson Letts on September 7 and 8, 1960. Argument on September 7 was heard on the two motions for summary judgment, the Court reserving judgment.

Although appellant Goodman and Bebchick had not been served with the Commission motion (JA 17), had learned of its pendancy only shortly before the hearing, and had not prepared nor filed a statement of opposition thereto, appellants waived their right to object if adequate time for oral argument were permitted. On these representations, the Court below granted appellants leave to argue the Commission's motion to dismiss on the following day, September 8, 1960.

At the hearing on the Commission motion to dismiss, appellants moved to strike the first ground of that motion relating to appellants' capacity to sue, as such an issue was not properly before the Court under the Federal Rules of Civil Procedure. The Court deferred its ruling. After hearing argument on the merits of the

Commission's motion, the Court ruled from the bench that appellants lacked capacity to bring the action and the complaint was dismissed. An order was entered on September 15, 1960, which found that ". . . it appearing to the Court that the record certified to the Court contains no evidence to support the plaintiffs' allegation that they are riders of Transit vehicles or are persons affected by the Order of the Commission appealed from, that, accordingly, within the statute governing review of orders of the Commission, the plaintiffs are without standing to bring this appeal . . . ." (JA 20).

Appellants' Notice of Appeal was filed September 17, 1960 (JA 20). Appellants thereafter filed motions for expedition of the appeal and for waiver of the Court's printing requirements. By Order of September 28, 1960, the Court, per Chief Judge Prettyman, waived printing requirements and ordered that the case shall be advanced for argument to as early a date as the business of the Court will permit.

STATUTES INVOLVED

This appeal involves an interpretation of the foregoing Section 43-705 which grants the right of filing a petition of appeal to any person affected by a final order or decision of the Commission. The appeal also concerns the Act of March 4, 1913, 37 Stat. 989, ch. 150, §8, par. 66, as amended August 27, 1935, 49 Stat. 883, ch. 742, §2, D. C. Code, Title 43, §43-706, which section sets forth the scope of review in proceedings under Section 43-705. Both sections are set forth in full in the Appendix hereto.

STATEMENT OF POINTS

1. The Court below erred in failing to strike or deny the Commission's Motion to Dismiss the Complaint for appellants' lack

of capacity to sue since this motion was not properly before the Court under Rules 9(a) and 12(h) of the Federal Rules of Civil Procedure.

2. The Court below erred in failing to exercise jurisdiction independent of the record of the Commission proceedings certified to it and to consider all relevant evidence before it relating to appellants' capacity to sue, and to find that appellants possessed capacity to sue.

3. Even assuming that the Court's jurisdiction to determine appellants' capacity to sue was limited solely to the record of Commission proceedings, the Court below erred in failing to find (a) that the evidence before the Commission demonstrated that appellant Goodman was a transit commuter and thus had capacity to sue; and (b) that the Commission had implicitly found that both appellants were transit riders and "persons affected" and thus had capacity to sue.

4. Even if this Court should not sustain any of appellants' foregoing allegations of error, the Court below erred in failing to remand the cause to the Commission for further findings as to appellants' status as transit riders.

SUMMARY OF ARGUMENT

The Commission's motion to dismiss was not properly before the Court. Rule 9(a) of the Federal Rules of Civil Procedure requires that lack of capacity be raised by a specific negative averment, and the objection cannot be raised by a mere allegation of "insufficient knowledge or information to form a belief." Further, an objection to the capacity of a party is waived under the provisions of Rule 12(h) unless it is raised by Motion prior to the Answer or appears in the Answer. It cannot be raised by a Motion to Dismiss filed subsequent to the Answer.

It is uncontroverted that appellants have capacity to bring their action if they are riders of the vehicles of D. C. Transit System, Inc. Appellants' standing to exercise the statutory right of appeal of Commission orders is a matter for judicial, not administrative, determination, and the Court possesses an independent jurisdiction to decide this issue and thus to determine its own jurisdiction. Nor does the statute require appellants to demonstrate their capacity to sue to the Commission as a condition precedent to the exercise of their statutory right of appeal. The statute requires only the filing of a petition for reconsideration as the final administrative remedy to be exhausted prior to bringing suit to question the lawfulness of a Commission order or decision.

The Court erred in failing to exercise its independent jurisdiction and in failing to consider all the relevant evidence before it--including uncontroverted affidavits submitted to the Court and the findings and evidence before the Commission relating to appellants' status as transit riders--and in failing to find on the basis of such evidence that appellants possessed capacity to sue.

Even if it should be assumed, arguendo, that the Court's determination of appellants' capacity must be restricted to the record before the Commission, the Court erred in finding that the record contained no evidence to support appellants' allegation that they are transit riders. Such evidence did exist in the form of an uncontroverted affidavit by appellant Goodman that he was a transit rider. Further, the Court below erred in not following the necessary and implicit findings by the Commission that appellant Goodman was a transit commuter when it granted him intervention, and that appellants Bebchick and Goodman were transit riders and were "persons affected" when it denied their petition for reconsideration on the merits.

Even if this Court finds that evidence of appellants' capacity to sue must appear in the Commission record and that the Court

below did not err in finding there was none . contained in said record, the Court below nevertheless erred in dismissing the Complaint and in not remanding the cause to the Commission for further evidence and findings as to appellants' capacity to sue.

ARGUMENT

I.

THE COURT BELOW ERRED IN GRANTING THE COMMISSION'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF CAPACITY TO SUE AND IN FAILING TO STRIKE OR DENY THE MOTION, SINCE THIS MOTION WAS NOT PROPERLY BEFORE THE COURT UNDER RULES 9 and 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Appellants specifically set forth the jurisdiction of the District Court in their Complaint of May 20, 1960, by alleging that the Complaint was filed "pursuant to Section 43-705, D. C. Code (1951)" (JA 10). This section grants a right of appeal to a "person affected" by the final order or decision of the Commission. Pursuant to this statute, appellants alleged in their Complaint that they were affected by the final order and specifically wherein they were affected; the Complaint stated in paragraph II (JA 10):

> Each of the plaintiffs are individuals who ride the regularly scheduled vehicles of Transit from place to place in the District of Columbia and are affected by Order 4631 and by the schedule of rates authorized therein since such rates are charged as a condition of riding said vehicles.

Defendant Commission answered: "This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II." (JA 15). The defendant Transit answered (JA 16):

> 2. D. C. Transit alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph II of the complaint, except that D. C. Transit admits that the rates of fare authorized by Order No. 4631 are charged by D. C. Transit as a condition of riding its regularly scheduled vehicles which operate in the District of Columbia.

Appellants urge that these answers raised no issue of appellants' capacity to sue and that, therefore, such issue was thereafter waived by the parties under the Federal Rules of Civil Procedure.

Rule 9(a) of the Federal Rules[1/] requires that the defense of lack of capacity be raised by a specific negative averment. Such an objection cannot be raised by a general denial or even by an averment of an absence of information or knowledge sufficient to form a belief. Banking and Trading Corp. v. Reconstruction Finance Corp., 15 F.R.D. 360 (S.D.N.Y. 1954), and citations therein.

Failure to raise the objection of lack of capacity in the proper fashion and at the proper time results in total waiver of such defense under Rule 12(h) of the Federal Rules.[2/] It is settled that failure to raise the defense by a specific negative averment in the answer or by motion prior to answer results in such waiver. The objection cannot be properly raised for the first time in a motion subsequent to the filing of the answer. Chemacid, S.A. v. Ferrotar Corporation, 3 F.R.D. 45 (S.D.N.Y. 1942) See also Jones v. Schellenberger, 196 F. 2d 852 (7th Cir. 1952).

1/ Rule 9(a) provides: "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

2/ Rule 12(h) provides: "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

The Commission here did not properly raise the issue of appellants' capacity when they pleaded in their answer that they did not possess sufficient knowledge or information to form a belief as to appellants' allegation that they were transit riders. Nor could they successfully seek to raise the objection in a motion to dismiss filed subsequent to their answer and over three months after the Complaint had been filed and only shortly before a hearing had been scheduled on appellants' motion for summary judgment on the merits.

Appellants' capacity was not properly before the Court. The Court erred in considering the issue and in dismissing the suit upon an adjudication thereon. Further, the Commission failed to request the Court to permit it to take any possible action to cure its default and waiver and the Court did not grant any such curative action. It is now too late for any such curative action.

Aside from the unequivocal violation of the Federal Rules of Civil Procedure, general considerations of equity militate against the consideration of the Commission's motion at so late a point in the proceedings. As shown below the Commission had treated appellant Goodman as a transit rider from the commencement of the Commission proceedings. Further, the Commission presented no evidence with their motion to controvert the evidence supporting appellants' allegations that they are transit riders--including appellants' uncontested affidavits. The Commission has asserted no fact not known to them at the time suit was filed. Indeed, it has asserted no facts, but merely alleged that the record before the Commission fails to show that appellants are transit riders. There is no question here of facts not apparent on the face of the pleadings or newly discovered evidence unavailable at the time when the issue should properly have been brought to the attention of the Court and the parties.

II.

THE COURT BELOW ERRED IN FAILING TO EXERCISE JURISDICTION INDEPENDENT OF THE RECORD BEFORE THE COMMISSION AND TO CONSIDER ALL RELEVANT EVIDENCE BEFORE IT RELATING TO APPELLANTS' STANDING OR CAPACITY TO APPEAL.

a. Capacity to sue requires an independent and exclusive judicial determination and cannot properly be treated with the limited judicial scrutiny rendered administrative determinations.

It is not clear from the Court's ruling below why it was thought necessary to review only the evidence before the Commission to determine the question of appellants' standing or capacity to appeal. The Court merely held that since the record before the Commission contained no evidence of appellants' standing, the complaint will be dismissed. Appellants submit that the Court below erred in assuming that its jurisdiction to determine the question of standing was limited to the record made before the Commission. Appellants urge that such a showing would have been both irrelevant and immaterial to the issues properly before the Commission, and is not required by the applicable provisions of District of Columbia law.

Section 43-705 of the District of Columbia Code specifies that "Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court." One can surmise that the court below may have interpreted this as a binding requirement that the issue of capacity to sue be treated in the same fashion as the substantive issues within the peculiar expertise of the Commission and subject to its primary jurisdiction. But merely to so state the matter serves to indicate that such a reading clearly misconstrues the intent of Congress and the natural and logical meaning of the statutory scheme taken as a whole. It is instructive to note that the passage quoted above is immediately qualified by the statement that "The said court . . . before whom any such appeal shall be heard, may require and direct

the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence." (Emphasis added.) Clearly then, the requirement of a hearing based on the Commission record is intended to relate to the substantive issues on appeal. These are the findings and conclusions embraced in the Commission Order; they do not include or relate to the question of who may properly institute the appeal.

The question of standing or capacity or seek review arises from the exercise of a statutory right of appeal and calls for a judicial determination. The question is not an administrative matter and clearly does not fall within the expertise or primary jurisdiction of the Commission. Evidence relating to appellants' standing to seek judicial review of a Commission order or decision would have been irrelevant and immaterial to the issues before the Commission, which related to a proposed increase in the District of Columbia transit fares.

b. The requirement that administrative remedies be exhausted cannot be taken to mean that evidence of capacity to sue must be presented to the Commission.

The nature of the issue before the Court may be put in sharpe focus if the issue of exhaustion of administrative remedies is contrasted with the present issue of appellants' standing. Evidence of the former issue clearly must appear in the record before the Commission, since the record should clearly demonstrate that complainant allowed the Commission an opportunity to fully exercise its primary jurisdiction on the merits before the Court is asked to review Commission action. A question of capacity, on the other hand, relates solely to the question of who may properly invoke judicial jurisdiction, and evidence of such matters is irrelevant and immaterial to the proceeding before the Commission.

The requirement that the filing of a petition for reconsideration before the Commission precede an appeal to the District Court does not serve to transfer the determination of who is a person "affected" by the decision of the Commission exclusively to the Commission. The Commission merely is to decide who is entitled to file the petition for reconsideration. Its decision in this respect, like that in regard to who has a right to intervene in its proceedings, is subject to judicial scrutiny. After the Commission has acted on a petition for reconsideration, the issue then presents itself to the Court as to who is a person affected for the purpose of perfecting the statutory right of appeal to the Courts. As the Commission must consider all evidence before it upon passing upon the propriety of a petition for reconsideration, so must the court exercise a similar function in respect to an appeal. Both have their respective and different roles to perform in determining their respective and different jurisdictions in conformance to the statutory scheme determined by the Congress. But the action of the Commission in passing upon a petition for reconsideration and thereby making an issue ripe for review as to those petitioners who have exhausted their administrative remedies does not affect the Court's power and duty to determine who may seek review of such a ripe issue.

Moreover, the Court below erred in failing to follow the clear mandate of Section 43-705, which requires appellants to present no more than a petition for reconsideration before the Commission before seeking judicial review of Commission action. A "person affected" by a Commission order or decision is granted the statutory right to complain in the District Court; it is a right granted to a person affected, not to a party before the Commission, nor to a party subject to the jurisdiction of the Commission. As this Court has held, an appearance before an administrative body does not premise the right of judicial review:

> The use of these procedural devices [before the administrative body] is not for the purpose of creating rights, or interests, however, but for protecting existing rights and interests.

Yankee Network v. Federal Communications Commission, 71 App. D. C. 11, 107 F.2d, 212, 217 (1939). The statute in the present proceeding does not require appellants to have intervened before the Commission or to have presented evidence before the Commission, or to have requested findings relating to their capacity to sue or standing. The statute very specifically requires only the filing of a petition for reconsideration. The Court below seeks to impose an administrative prerequisite to appellants' statutory right of appeal which Congress did not see fit to require.

In the predecessor statute, there was not even the requirement of a petition for reconsideration. The earlier statute provided for a suit in equity by "any person or corporation interested." In Hollis v. Kutz, 255 U. S. 452, 454, 41 S. Ct. 371 (1921), the Court overruled a determination that complainants must have been parties before the Commission and under these earlier review provisions held:

> We do not perceive any advantage in requiring a party to file a complaint asking the Commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute. On the other hand we see no requirement that the plaintiffs in equity should have appeared in the original hearing upon the rate. They are parties to the order equally whether they saw fit to argue the case to the Commission or not, and when they stand upon supposed constitutional rights there seems to be no necessity of raising the point until they get into court. This suit is not for a revision of details but for a decree that the orders are void as a matter of law.

The reasoning of this Court in the Hollis case appears to have been similar to that evidentially followed by the Court below in the present cause. In deciding the Hollis case, Judge Van Orsdel commented, "the equitable proceeding in the Supreme Court of the District of Columbia under paragraph 64 is in the nature of an appeal rather than an original suit. The act contemplated that it shall be heard upon a transcript of the record made before the

Commission, and not alone upon evidence adduced at the trial...." Hollis v. Kutz, 49 App. D. C. 301, 265 F. 451, 452 (1920).

In both the Hollis case and the case at bar, there were equally unjustified attempts by the lower courts to extend the requirement that the Commission decision be based, in whole or in part, on the record before it in a fashion to inhibit and restrict the statutory right of appeal. In the Hollis case the record requirement was utilized by the lower court to change, in effect, the statutory right of appeal given to any "person interested" to one given only to "a person interested who is also a party to the proceeding." This perhaps can best be viewed as imposing a new administrative remedy to be exhausted--i.e. participation in the Commission hearing. In the case at bar, the record requirement is used to fashion a more frontal attack. The exercise of the statutory right of appeal was restricted by the Court below not so much by imposing prior administrative "remedies" to be exhausted, but by partially delegating the power and duty of the Court to determine who has capacity to exercise that right.

This court has held that a consumer of a utility is a "person affected" by Commission action in respect to the rates charged by such utility. U. S. v. PUC; Pollak v. PUC cited infra page 17. Thus, the action of the Court below would in effect restrict the statutory right of appeal given by Congress to a "person affected" (a consumer) to a "person affected (consumer) who has appeared before the Commission, has presented evidence that he is a person affected (consumer), whom the Commission has found to be a person affected (consumer) and who thereafter has filed a petition for reconsideration." While this in a sense imposes additional administrative steps that must be pursued, its real effect is more to invest the Commission with a portion of the judicial function which only the Courts may exercise, that is, the determination as to who is "affected". If the extension of the record requirement

was unwarranted in the Hollis case, a fortiori, such an inversion of the Congressional mandate is even more unjustified in the case at bar. The learning to be drawn from the Hollis case is that the statutory right of appeal cannot be restricted to an extent beyond that expressly sanctioned by the Congress, particularly by an unwarranted extension of the record requirement.

When Congress intends that full and active participation in an administrative proceeding be a prerequisite to the exercise of judicial review, it has stated so in express and unequivocal terms. Only recently Congress approved a compact between the States of Maryland and Virginia and the District of Columbia which rewrites the review provision regarding local agency decisions on transit matters. Act of September 15, 1960, 74 Stat. 1031. Section 17(a) of this enactment provides:

> 17. (a) Any party to a proceeding under this Act aggrieved by an order issued by the [Washington Metropolitan Area Transit] Commission in such proceeding may obtain a review of such order . . .

Under the new Compact a complainant must both have been a "party" to the proceeding before the local commission and have been "aggrieved" by an order.[3/]

In addition to the terms of Section 43-705, on the other hand, the legislative history of the latter section clearly shows that Congress intended to require a person seeking judicial review merely to file a petition for reconsideration, but not to have been a party before the Commission or to have done anything further before the Commission. In the Congressional hearings on the current wording of the review section, counsel for the local telephone company testified:

3/ Even here it should be noted the question of who is a person "aggrieved" and thus eligible to seek judicial review remains for the determination of the Court. The statutory requirement that a party seeking review must have been a party to the proceeding before the Commission relates to the question of whether administrative remedies have been exhausted. In its choice of language Congress has recognized that this question is inherently different from the question of who may seek review once such remedies are exhausted and an issue is ripe for review.

> Under the public utility law here any rate payer is affected. A man that has never been in this litigation before, never shown his hand, this gentleman right here, representing the civic organizations, never having been in the litigation, could walk in after this Commission has decided and entered an order, and file an application under this law for rehearing or reconsideration, because he is a party at interest, because he and the people he represents in his associations are affected by that order.

Hearings on H. R. 3462 before the Subcommittee on Public Utilities of the Committee on the District of Columbia, 74th Cong., 1st Sess. February 8, 1935, page 9. And Corporation Counsel Prettyman stated:

> In the first section of the bill, we require that after an order of the Commission, anybody interested may make an application for a reconsideration and then that no appeal shall lie unless an application for reconsideration has been made, [Id. at page 2.]

Today there is even greater reason to give the provisions governing review of Commission decisions an effect at least equal to that in the Hollis case; for in allowing review upon complaint of a "person affected," rather than "interested," Congress expanded the privilege of complaint and appeal beyond the conventional tests used in equity suits seeking restraint of government action. United States v. Public Utilities Commission of the District of Columbia, 80 App. D. C. 227, 151 F. 2d 609 (1945). And parties aggrieved by an administrative agency order act as representatives of the public interest. Virginia Petroleum Jobbers Association v. Federal Power Commission, 104 App. D. C. 106, 259 F. 2d 921 (1958). The necessity for permitting such representation of the public interest is underscored by the demise of Public Counsel in the District of Columbia.[4/]

4/ The Office of "People's Counsel," an additional counsel of the Commission, to be appointed by the President by and with the consent of the Senate and whose duty was to "represent and appear for the people of the District of Columbia" in all Commission hearings and judicial proceedings involving consumer interests was established by Act of December 15, 1926, 44 Stat. 921, ch. 8, §3, D. C. Code, Title 43, §43-205. This Office was abolished by Section 2(b) of Reorganization Plan No. 5 of 1952, 66 Stat. 824, D. C. Code, Title 1, Appendix.

c. The Court must consider and rule upon all evidence before it relating to standing or capacity to sue.

This Court has held that a consumer is a "person affected" within the meaning of Section 43-705. United States v. Public Utilities Commission of the District of Columbia, supra. More particularly, this Court has held that a transit rider likewise is a person affected and entitled to seek judicial review of Commission orders and decisions in transit proceedings. Pollak v. Public Utilities Commission of the District of Columbia, 89 App. D. C. 94, 191 F.2d 450 (1951), reversed on other grounds, 343 U.S. 451, 72 S. Ct. 813 (1952).

Having independent jurisdiction to determine whether appellants were transit riders, and thus persons "affected" by the Commission's order, the Court below erred in failing to consider all the evidence before it bearing upon this question and then to decide in appellants' favor. Of utmost importance were appellants' uncontroverted affidavits (JA 18, 19). Further, the implicit findings of the Commission that appellants were transit riders and appellant Goodman's uncontroverted affidavit (JA 5) before the Commission that he was a transit commuter--matters discussed at length hereinafter--were also species of evidence properly before the Court.

It is clear that the Court has the authority to consider questions of jurisdiction on the basis of affidavits, at least where the question of jurisdiction is not dependent upon a decision of the merits. The affidavits are a species of evidence. Land v. Dollar, 330 U. S. 731, 735, 67 S.Ct. 1009 (1947). See also Mechanical Appliance Company v. Castleman, 215 U.S. 437, 30 S. Ct. 125 (1910). Particularly when such affidavits are uncontroverted on a motion to dismiss, a liberal presumption is to be indulged in favor of the plaintiff, unless the facts create a legal certainty of a lack of jurisdiction. Wetmore v. Rymer, 169 U.S. 115, 127-28, 18 S. Ct. 293 (1898). See also the extended discussion hereinafter, and Rule 43(e) of the Federal Rules of Civil Procedure.

In view of all the evidence before it, this Court should find that appellants have the requisite standing or capacity to appeal, and should remand for a decision on the merits of the case. There is no need to remand to the trial court for a finding of standing, since all the evidence is documentary. McComb v. Utica Knitting Co., 164 F. 2d 670, 674 (2d Cir. 1947). As the Court of Appeals in the Tenth Circuit has held:

> Ordinarily, a finding of the trial court on a controverted issue of fact will be followed on appeal, unless it is clearly erroneous. The reason underlying the rule is that the trial judge has had the opportunity of observing the witnesses while testifying and their demeanor on the witness stand and is in a better position to judge of their credibility. But, where the case is heard below on verified pleadings and affidavits, the reason for the rule is not present. On the contrary, the appellate court is equally capable of examining the evidence and drawing conclusions from it, and is under the duty of doing so.

Bowles v. Beatrice Creamery Co., 146 F.2d 774, 780 (10th Cir.1944).

III.

THE COURT BELOW ERRED EVEN IF WE ASSUME ITS JURISDICTION TO DETERMINE APPELLANTS' CAPACITY TO SUE IS LIMITED SOLELY TO THE RECORD BEFORE THE COMMISSION.

a. The Court erred in failing to find from the evidence before the Commission that appellant Leonard S. Goodman is a commuter and hence has standing or capacity to appeal.

The Court below in effect never reached the question whether appellants have standing or capacity to appeal, although it purported to find a lack of standing. The Court merely held that the record before the Commission contains no evidence of standing. Appellants' capacity as transit riders was never questioned by any party before the Commission, and it was at all times clearly understood that appellants' interests were adverse to those of Transit. It is the law of this jurisdiction that any person who is a transit rider has the requisite interest to appeal a Commission order relating to Transit. Pollak v. Public Utilities Commission of the District of Columbia, cited supra, p. 17.

The Court below erred in failing to find from the evidence before the Commission alone that appellant Leonard S. Goodman is a transit rider and hence is a person affected within the meaning of the statute. The Court's ruling fails to consider the uncontested affidavit of this appellant which was attached to his petition for intervention as a party before the Commission (JA 5). This affidavit was certified to the Court below as part of the record on appeal; this certificate appears in the record docketed with this Court. Appellants submit that an uncontested affidavit accompanying a petition for intervention constitutes evidence of the facts stated therein, and that the Court below erred in dismissing the complaint on the grounds there was no evidence of record before the Commission of appellant Goodman's standing.

At common law affidavits generally were not admissible as evidence, except in certain types of proceedings. While these appellants do not conten that the common law should prevail here, it is historically significant that even at common law affidavits were evidence of the facts contained therein when used in interlocutory proceedings, such as motions before the Court or, as here, on petition for intervention. It was early held that the common law rules of evidence in such proceedings simply did not apply. Professor Wigmore explains:

> The most notable deviation, in 'ex parte' proceedings, from the ordinary rules of Evidence is seen in the use of affidavits, the cross-examination being dispensed with; and the proceeding of habeas corpus is that in which the question assumes the greatest importance.
>
> . . . So too, in all interlocutory proceedings, even when responsory and not 'ex parte' -- for example, a motion for a new trial or for an injunction -- the usual system of rules is ignored, again partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of Evidence are, as rules, traditionally associated with a trial by jury.

1 Wigmore, Evidence (3d ed. 1940) Sec. 4; see also 4 id., Sec.1709.

The rules of evidence generally are not applicable to administrative proceedings, since they derive from jury-trial proceedings.

See discussion in 1 Wigmore, supra, § 4a et seq. The available evidence indicates that affidavits before the Commission have at least equal force to those before the Federal Courts in non-jury proceedings. A District of Columbia statute provides:[5/]

> Each notary public shall have power . . . to take affidavits to be used before any court, judge, or officer within the District.

Even more, Rule 12.7 of the Commission's Rules of Practice and Procedure provides that the judicial rules of evidence in non-jury proceedings apply in formal hearings before the Commission.[6/]

The nature of an affidavit in an interlocutory proceeding before the Federal Courts is disclosed by its treatment in Rule 56 of the Federal Rules of Civil Procedure. The Rule continually distinguishes an affidavit from a pleading [Rule 56(a), (b), and (c)], and refers to their effect as "supporting" the motion for summary judgment [Rule 56(a) and (b)]. Affidavits are evidence and if unopposed will support the granting of summary judgment under Rule 56. As Professor Moore describes their effect in 6 Moore's Federal Practice (2d ed. 1948) §56.11/37:

> The merit of the supporting or opposing affidavit that measures up to the standard of 56(e), supra, is that it presents sworn evidentiary materials.

He continues that although the affidavit is evidence, it omits certain desirable characteristics of a trial, so that "a trial by affidavits" is not contemplated by the Rule; but:

> Nevertheless there will be many situations where the movant for summary judgment can establish by affidavits that there is no genuine issue of material fact to be tried. Where on the basis of the materials presented by his affidavits the movant would be entitled to a directed verdict and the opposing party

---

5/ Act of March 3, 1901, 31 Stat. 1280, ch. 854, §568, as amended June 30, 1902, 32 Stat. 533, ch. 1329, D. C. Code, Title 1, §1-511.

6/ Rule 12.7 provides: "The rules of evidence applied in civil proceedings in the courts of the United States in matters not involving trial by jury shall be applied in formal hearings; provided, however, that the presiding officer, or the Commission, may relax those rules in any hearing when, in his or its judgment, the ends of justice would be better served by so doing." Appellants request judicial notice of this Rule, as well as the Rules quoted on pages 1, 2, and 3 of the Joint Appendix.

> fails either to offer counter-affidavits or other materials that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party.

It plainly appears that affidavits may constitute "evidence" in Federal practice, even though the nature of the particular motion before the Court may force the Court to make only limited use of such evidence.

Appellants submit that the affidavit of Leonard S. Goodman attached to his interlocutory petition for intervention constitutes evidence that such appellant is a commuter. On the basis of this affidavit, and in accordance with the authorities discussed above and in point II, the Court should find that this appellant is a "person affected" and remand for a decision on the merits of the appeal.

b. <u>The Court erred in failing to follow the Commission's implicit findings and in turn to find that appellants were transit riders and thus had the requisite standing or capacity to appeal.</u>

Appellant Leonard S. Goodman's affidavit, referred to in the foregoing subsection and set forth on JA 5, contained but one averment of interest that is relevant to this proceeding. In his affidavit this appellant stated under oath that he was a commuter on the streetcars and busses in the District of Columbia. Rule 7.1 of the Commission requires an intervenor to show "substantial interest." (JA 1). In the Commission's Order No. 4592 of November 19, 1959, granting the appellant intervention in the instant proceeding, the Commission stated that"upon consideration of the petition . . . the allegations contained therein and the affidavits attached thereto . . . the Commission has concluded that the substantial interest contemplated by Rule 7.1 of the Commission is present..."(JA 6).

Appellants urge that of necessity there was implicit in this conclusion a finding by the Commission that appellant Goodman was a transit rider, for no other basis for his interest was presented

to it. The Court below erred in failing to follow this implied finding of the Commission that appellant Goodman was a transit rider and in failing to find that he thus possessed the requisite standing to sue. The Court could not set aside or ignore this administrative finding, for it was supported by the evidence.

It, of course, is quite true that Rule 7.4 of the Commission specifies that the granting of a petition for intervention "shall not constitute a determination by the Commission that the intervenor is or will be affected by its final order or decision." (JA 1, 2). But what appellants urge here is not that the Commission found that appellant Goodman was a person "affected" when it permitted him to intervene; merely that it of necessity found him to be a transit rider. The limitation stated in Rule 7.4 above operates in effect merely as an admission and warning to intervenors that the Commission is without jurisdiction to determine who has the requisite capacity to seek judicial review.

Secondly, both appellant Goodman and appellant Bebchick filed their petition for reconsideration of the Commission's final order in this proceeding on April 1, 1960. In this petition, appellants alleged that they were "transit riders."

In Order No. 4645 of April 27, 1960, the Commission denied appellants' petition for reconsideration on the merits. Indeed, the Commission asserted in its Order that it had "carefully reviewed the record and our order entered in this proceeding in light of the subject petitions for reconsideration." (JA 8). Implicit in this denial on the merits was a finding that appellants were "persons affected" by the final order within the meaning of Rule 1.4.1 (on JA 2) and within the meaning of the statute, and thus were transit riders. The Rule assimilates the statutory requirement. Only a "person affected" had standing under the Commission's Rules of Practice to file for reconsideration; hence, the Commission's denial on the merits implied the ultimate finding that appellants had the status to make them a person affected.

Professor Davis explains the doctrine of implied findings in 2 Davis, Administrative Law Treatise, Sec. 16.07, page 456 (1958):

> If a statute provides that the agency shall grant the certificate if it finds that the grant is in the public interest, and if the agency grants the certificate without saying anything about the public interest, good sense requires that the reviewing court should imply the ultimate finding of public interest.

It is well established that findings may be implied from the action taken by an administrative body. In Pacific States Box & Basket Co. v. White, 296 U. S. 176, 185, 56 S. Ct. 159 (1935), the Court specifically refused to require an administrative body to make findings to support an exercise of rule-making power. In that case a State agency had issued an order fixing specifications for containers of berries. The Court held:

> But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. [296 U. S. at 186, 56 S. Ct. at 163.]

Subsequently, the Court stated in Thompson v. Consolidated Gas Co., 300 U. S. 55, 69, 57 S. Ct. 364 (1937):

> It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise.

See also United States v. Rock Royal Co-op, 307 U. S. 533, 567-68, 59 S. Ct. 993 (1939).

On the basis of these implicit findings which the Court was bound to follow, and in accordance with the authorities discussed above and in point II, the Court should find that these appellants are persons affected and have the requisite standing to appeal.

IV.

EVEN ASSUMING THE COURT SHOULD NOT SUSTAIN ANY OF APPELLANTS' FOREGOING ALLEGATIONS OF ERROR, THE COURT NEVERTHELESS ERRED IN DISMISSING AND IN FAILING TO REMAND THE CAUSE TO THE COMMISSION FOR FURTHER FINDINGS AS TO APPELLANTS' STATUS AS TRANSIT RIDERS.

In view of the status of the evidence relating to appellants' standing or capacity to appeal, the fact that no party ever

questioned appellants' status as transit riders before the Commission, and the presence of uncontested affidavits both before the Commission and in the Court below attesting to appellants' standing or capacity to appeal, it was an abuse of discretion to dismiss the appeal. Moreover, the substance of the appeal involved important and difficult questions of law relating to the action of the Commission in allowing a fare increase after allowing Transit an excessive return, excessive expense allowances, the inclusion of abandoned property in the rate base, and committing many other such errors. The ruling of the Court below is extremely technical and of first impression.

Section 43-705 clearly provides an alternative procedure to dismissal of the suit. If there is a defect in the record, the Court is empowered to remand the case for the limited purpose of a certification of such evidence or findings to the Court. This procedure was clearly contemplated by the statute on technical and ancillary issues of this sort. Appellants urge that the Court below erred in failing to remand the case to the Commission, even assuming their other allegations of error are not sustained.

V.

CONCLUSION

For the foregoing reasons, appellants pray that the Court find that these appellants have the requisite standing or capacity to appeal the Commission's final order herein, or in the alternative that the Court reverse and remand forthwith for such a finding or for proceedings which will lead to such a finding; that the Court below be ordered to hear and determine appellants' motion for summary judgment with expedition; and that appellants recover their

costs of this appeal, but that in any event, because of the nature and financial circumstances of these appellants and the public interest involved, that appellees bear their own costs.

Dated this 12th day of October, 1960.

Leonard S. Goodman, pro se
4336 River Road, N.W.
Washington 16, D.C.

Leonard N. Bebchick, pro se
Suite 400
1632 K Street, N.W.
Washington 6, D.C.

APPELLANTS

APPENDIX

Act of March 4, 1913, 37 Stat. 989, ch. 150 § 8, par. 65; as amended by Act of August 27, 1935, 49 Stat. 882, ch. 742, § 2; District of Columbia Code, Title 43, section 705:

> The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: Provided, That the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.
>
> Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission

or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States.

Act of March 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 66; as amended by Act of August 27, 1935, 49 Stat. 883, ch. 742, § 2; District of Columbia Code, Title 43, section 706:

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious.

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Appellants and of the Joint Appendix in this cause upon the Honorable Chester H. Gray, counsel for the Public Utilities Commission of the District of Columbia by leaving a copy at his office in the District Building, Washington, D. C., on the 12th of October 1960, with the person in charge thereof, and upon Harvey M. Spear, Esq., counsel for D. C. Transit System, Inc., by leaving a copy at his office, 3600 M Street, N. W., Washington, D. C. on the 12th of October 1960 with the person in charge thereof.

Leonard N. Bebchick

Leonard S. Goodman

BRIEF FOR APPELLEE PUBLIC UTILITIES COMMISSION

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 15,999

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV - 4 1960
Joseph W. Stewart
CLERK

LEONARD N. BEBCHICK
and
LEONARD S. GOODMAN,
Appellants,

v

PUBLIC UTILITIES COMMISSION
OF THE DISTRICT OF COLUMBIA
and
D. C. TRANSIT SYSTEM, INC.
Appellees.

Appeal From The United States District Court
For The District Of Columbia

CHESTER H. GRAY
General Counsel

GEORGE F. DONNELLA
Counsel

ANDREW G. CONLYN
Counsel

Attorneys for Appellee
Public Utilities Commission
District of Columbia
District Building
Washington 4, D. C.

QUESTIONS PRESENTED

In the opinion of appellee Public Utilities Commission the questions presented are:

1. Whether, under a statute giving the District Court of the United States jurisdiction to hear and determine appeals filed by persons "affected" by a final order of the Commission and by which the hearing on appeal is limited to the record made before the Commission, the District Court may entertain an appeal when the record before the Commission is devoid of any evidence to support appellants allegations that they are "affected" customers of the utility involved?

2. Assuming arguendo, that appellants are transit riders, or customers of the Transit Company, can they be said to be "affected" by an order of the Public Utilities Commission when they have an election under the fare structure authorized which permits them to pay the identical fare previously in effect?

I N D E X

SUBJECT INDEX

	Page
Questions Presented	i
Counterstatement of the Case	1
Statement of Statutes Involved	5
Summary of Argument	6
Argument:	
Preliminary Statement	7
I The District Court Properly Dismissed An Appeal From An Order Of The Commission Where The Record Did Not Support Appellants Allegation They Were Affected By Such Order	8
II Assuming Arguendo Appellants Are Transit Riders It Does Not Follow Under The Circumstances Of This Case That They Are Affected By The Commission's Order	11
Conclusion	13

CASES CITED

	Page
Banking and Trading Corp., v. Reconstruction Finance Corp. (S. D., N. Y., 1954), 15 F. R. D. 360	7
Chemacid, S.A., v. Ferrotar Corporation (S. D., N. Y., 1942), 3 F. R. D. 45	8
Jones v. Schellenberger (7th Cir. 1952), 196 F. 2d. 852	8
Lewis-Hall Iron Works v. Blair 57 App. D. C. 364, 23 F. 2d. 972	8
McNutt v. General Motors Acceptance Corp. 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135	9
Royalty Service Corporation v. City of Los Angeles 98 F. 2d. 551, (9th Cir.)	9
U. S. v. Public Utilities Commission 80 App. D. C. 227, 151 F. 2d. 611	7
Woodsmen of the World Insurance Ass'n. v. F. C. C. 69 App. D. C. 87, 99 F. 2d. 122	9

STATUTES CITED

Act of March 4, 1913, Ch. 150, Sec. 8, Par. 69a, as added August 27, 1935 49 Stat. 884, Ch. 742, Sec. 2	5

DISTRICT OF COLUMBIA CODE, 1951, CITED

Section 43-704	8, 12
Section 43-705	7, 8
Section 43-710	5, 7
Section 44-214a, Supp. VIII	11

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 15,999

LEONARD L. BEBCHICK
and
LEONARD S. GOODMAN,

Appellants,

v.

PUBLIC UTILITIES COMMISSION
OF THE DISTRICT OF COLUMBIA
and
D. C. TRANSIT SYSTEM, INC.

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEE PUBLIC UTILITIES COMMISSION

COUNTERSTATEMENT OF THE CASE

On November 9, 1959, the Public Utilities Commission of the District of Columbia (hereinafter referred to as the Commission) suspended an increase in the schedule of rates filed by D. C. Transit System, Inc. (hereinafter referred to as the Company), ordered an investigation, and

gave notice of a Public Hearing. The existing rate structure when the Company filed for an increase was:

Cash Fare	20 cents
Token Fare	20 cents, to be sold in units of 5 for $1.00
School Fare	10 cents, with tickets to be sold in units of 10 for $1.00 or 20 for $2.00

Leave to intervene in the proceedings was granted to six individuals collectively referred to in their petition as Public Petitioners; the Friendship Citizens' Association, the District of Columbia Federation of Civic Assns. Inc., the Mount Pleasant Citizens' Association, the Citizens Transit Improvement Association, the Federation of Citizens' Associations, the Council of Defense Lodges, District of Columbia area, the American Federation of Government Employees and the District of Columbia Department, American Federation of Government Employees (Certified Record, Order No. 4631, Page 2).

Appellant Goodman was one of the persons signing Public Petitioners' petition to intervene (JA5) and entered his appearance in the proceeding as counsel for Public Petitioners and the Friendship Citizens' Association (Tr. 6).

Appellant Bebchick entered his appearance for Public Petitioners during the course of the proceedings. (Tr. 504).

After formal public hearing for eleven days during the period November 24, 1959 to February 19, 1960 inclusive, resulting in a record consist-

ing of 2,077 pages and 96 exhibits, the Commission rejected the Company's fare proposal and authorized the following rates of fare for transportation of passengers within the District of Columbia:

Cash Fare	25 cents
Token Fare	20 cents, to be sold in units of 5 for $1.00
School Fare	10 cents, with tickets to be sold in units of 10 for $1.00 or 20 for $2.00

(Certified Record, Order No. 4631, Page 7).

Expert testimony on the increased revenue to be anticipated from the authorized fare structure was to the effect that 70% to 90% of the adult passengers would utilize tokens. Based upon the record, the Commission decided that 70% token use was a reasonable estimate of what might be expected under the fare structure authorized. (Certified record, Opinion in Support of Findings, Conclusions and Order, Page 27-28).

Subsequently, the Commission received two petitions for reconsideration of its Order. One of these was filed by certain citizens' groups and individuals, including appellants Goodman and Bebchick, (JA6) and the other by the Company. Both petitions for reconsideration were denied, and with reference to the citizens' groups and individuals' contention in their petition that the Company was not entitled to any change in the pre-existing authorized fare structure, the Commission stated, inter alia:

> "As a practical matter, by the purchase of 5 tokens for $1.00, they experience no increase in fares under the fare structure authorized in this proceeding." (JA 7-8).

Thereafter, five persons filed a complaint requesting the United States District Court for the District of Columbia to vacate the Commission's Order (JA10-15). Paragraph II of the complaint alleged that:

> " Each of the plaintiffs are individuals who ride the regularly scheduled vehicles of Transit from place to place in the District of Columbia and are affected by Order No. 4631 and by the schedule of rates authorized therein since such rates are charged as a condition of riding said vehicles." (JA 10).

The answer of the Public Utilities Commission to the complaint was first that:

> "The complaint fails to state a claim against this defendant upon which relief can be granted."

and second, and with specific reference to the above quoted paragraph from the complaint, that:

> "This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II." (JA 15).

Defendant, D. C. Transit System, Inc., answered in substantially the same vein. The Commission further denied, as alleged in paragraph VI of the complaint, that one of the plaintiffs' group, Richard A. Williams, had filed a petition for reconsideration of Order No. 4631. (JA15). The defendant Company also denied, on information and belief, the allegation of paragraph VI of the complaint that Richard A. Williams had filed a petition for reconsideration of Order No. 4631. (JA16).

Thereafter, plaintiffs moved for summary judgment, the Company moved for summary judgment on its counter-claim, and the Commission moved to dismiss the complaint on the grounds that the Court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. (JA9). On September 7th and 8th, 1960, the Court heard argument on the motions for summary judgment (as well as the Company's separate motion for summary judgment against the Commission in Civil Action 1439-60, not involved in this proceeding) and the Commission's motion to dismiss. The Court dismissed the complaint, and an Order to that effect was entered on September 15, 1960. (JA19-20).

STATEMENT OF STATUTES INVOLVED

In addition to the statutes cited by appellants governing review of Commission's Orders, appellee believes the Act of March 4, 1913, Ch. 150, Sec. 8, Par. 69a, as added August 27, 1935, 49 Stat. 884, Ch. 742, Sec. 2, (Sec. 43-710, D. C. Code, 1951) is material. For convenience of the Court the Code citation will be used:

> "The method of review of the orders and decisions of the Commission provided by Paragraphs 43-704 to 43-709, herein, shall be exclusive."

SUMMARY OF THE ARGUMENT

Under a statutory method of review giving the District Court of the United States jurisdiction to hear and determine an appeal filed by a person affected by an Order of the Commission, which provides that the appeal shall be heard upon the record before the Commission, the District Court properly dismissed an appeal by plaintiffs who could not point to any evidence of record to support their allegation they were affected by the Commission's Order. The requirements on appeal are statutory and jurisdictional and the Court cannot be given jurisdiction by consent, acquiescence, or inadvertence. The Court properly ruled that, upon failure of plaintiffs to bring themselves within the statutory jurisdictional requirements, the appeal should be dismissed.

Assuming for purposes of argument that appellants could prove on the record that they are customers of the transit system, this does not establish that they are affected by the order complained of. Under the rate schedule authorized, the token fare of 20¢ and the school fare ticket of 10¢ were maintained, and a raise in cash fare from 20¢ to 25¢ was authorized.

The practical effect of the Commission's Order was to retain, for the average transit rider, the identical rate of fare as charged under the previous rate schedule. The position of the appellants, that if they utilize the cash fare authorized they will be affected by the Commission's Order does not change the fact that it is their own election rather than the Commission's Order which affects them.

ARGUMENT

Preliminary Statement

In its Points and Authorities and in its argument in support of the Commission's Motion to Dismiss, the Commission raised three issues. Its first point was that plaintiff, Richard A. Williams, had not filed an application for reconsideration with the Commission as alleged in the complaint and therefor, plaintiffs as a group including Williams, had no standing before the Court to prosecute an appeal. (Sec. 74-704, D.C. Code, 1951). In oral argument before the Court plaintiffs conceded this to be the fact and that Williams was not a proper party-plaintiff. Appellee has searched the record and found no evidence of action taken to remove plaintiff Williams from the case. Since the District Court did not base its dismissal upon this aspect of the case, appellees only purpose in pointing it out is to inform this Court of the full grounds bearing on its motion to dismiss in the Court below.

I

The District Court Properly Dismissed An Appeal From An Order Of The Commission Where The Record Did Not Support Appellants' Allegation They Were Affected By Such Order.

The second point raised by the Commission below and relied upon before this Court is that Sec. 43-705, D. C. Code, 1951, governs appeals from orders of the Commission. It provides, inter alia, that the District Court of the United States for the District of Columbia, shall have jurisdiction to hear and determine any appeal filed by a person affected by an order of the Commission and that such appeal shall be heard upon the record before the Commission and no new or additional evidence shall be received by the said Court. It is further provided in Sec. 43-710, that the statutory method of review of the Orders of the Commission is exclusive.

The settled law of this jurisdiction is that customers and consumers of public utilities are persons affected by rate orders. The right of appeal is statutory and the extent of the right depends upon the meaning of the language used in the statute. U. S. v. Public Utilities Commission, 80 U. S.App. D. C. 227, 151 F. 2d. 611. Appellants repeatedly, in their brief, substitute "capacity to sue" in speaking of the Commission's motion to dismiss for "lack of jurisdiction" and cite the following cases to demolish the straw man which they themselves have erected. Banking and Trading Corp. v. Reconstruction Finance Corp. (S. D., N. Y., 1954) 15 F. R. D. 360, where the defendant abandoned its

contention that the court lacked jurisdiction and raised the question of the corporate status of the plaintiff; Chemacid, S.A. v. Ferrotar Corporation, (S. D., N. Y., 1942) 3 F.R.D. 45, where the defendant asserted the Belgian law governed plaintiffs' right to institute the action and plaintiff had failed to plead Belgian law, and Jones v. Schellenberger, (7th Cir. 1952), 196 F. 2d. 852, where the only question presented on appeal involved the refusal of the court to allow the substitution of an Illinois administrator as party-plaintiff for and in place of a Texas administratrix.

It is the Commission's position that the statutory requirements that persons bringing an appeal be affected by the Order of the Commission is no less jurisdictional than the prerequisite of an application for reconsideration before appeal (Sec. 43-704, D. C. Code, 1951) or the time limitation for filing an appeal set forth in Sec. 43-705, D. C. Code 1951. These requirements are statutory and jurisdictional, not merely procedural, Lewis-Hall Iron Works v. Blair, 57 App. D. C., 364, 23 F. 2d. 972. Appellants apparantly recognize that they have the jurisdictional burden of showing that they are affected by the Order of the Commission since they alleged in the Court below that they were riders of transit and are affected by Order No. 4631 (JA10), and have cited Par. II of their Complaint as a factual basis for the jurisdiction of this Court in their statement of jurisdiction on Page I of their brief.

If the question of being affected is jurisdictional, as appellee believes; the appellants apparantly concede; and as the District Court held; the Commission is at a loss to determine the signifigance of appellants' contention that appellees did not raise "lack of capacity" in appellants by a specific negative averment. Jurisdiction cannot be given to a court by consent, acquiescence or inadvertence, a court can acquire jurisdiction only by authority of law, Woodmen of the World Life Insurance Ass'n. v. F. C. C., 69 App. D.C. 87, 99 F. 2d. 122. A plaintiff must plead jurisdictional facts and carry the burden of showing that he is properly in court throughout the litigation. The authority of a court to inquire into its own jurisdiction, particularly in cases where its jurisdiction is specially conferred, precludes the idea that jurisdiction may be obtained by a mere averment, or that a court is bound by the pleadings. Royalty Service Corporation v. City of Los Angeles, 98 F. 2d. 551 (9th Cir.), McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135.

The Commission's motion to dismiss the complaint below stated:

> "That the Court lacks jurisdiction in that the record fails to show that complainants are affected by the order complained of within the purview of the statute governing review of the orders of the Commission."

As pointed out above, the statute provides the exclusive method of appeal from orders and decisions of the Commission. Sec. 43-705 supra, limits

the District Court in its consideration of appeals before it from orders of the Commission, to the record made before the Commission. Whether a person appealing from an order of the Commission is a person "affected" must be determined from the record made before the Commission. Ample opportunity was given appellants by the District Court to show where, in the record, there was any support for their allegation that they are persons "affected" by the Commission's Order. Appellants impliedly conceded there is no such proof by submitting affidavits containing evidence dehors the record made before the Commission which could not be considered by the District Court in view of the statutory prohibition. As a consequence the District Court properly dismissed the appeal.

II

Assuming Arguendo Appellants Are Transit Riders, It Does Not Follow Under The Circumstances Of This Case That They Are Affected By The Commission's Order.

The third point raised by appellees below was that, assuming for purposes of argument, that appellants could establish from the record that they are customers of the transit system, it still does not follow that they would be affected by the order complained of. As will be noted from the statement of the case the only change in rates authorized by the Commission in its order was a raise in the cash fare from 20 to 25 cents. The school fare of 10 cents and a token fare of 20 cents, to be sold in units of 5 for $1.00, were retained,

and the uncontradicted expert testimony in the case indicated the cash fare would only be paid by some 10% to 30% of the adult transit riders. Thus the practical effect of the Commission's order was to retain, for the average transit rider, the identical rate of fare as charged under the privious rate schedule so that, in effect, for the average transit rider there was no fare increase involved. Of course, transit riders may elect to pay the higher cash fare authorized in Order No. 4631.

If it is the position of the appellants that if they utilize the cash fare authorized they will be affected by the Commission's order, this does not change the fact that it is their own election, rather than the Commission's order, which affects them.

Appellee believes that putting the proposition in a different perspective clearly illustrates the basic soundness of its premise. Under Act of Congress directing the Commission to fix the rate of fare for school children at not more than one-half the cash fare established from time to time for regular route transportation (Sec. 44-214a, D. C. Code, 1951 Supp. VIII), the school fare is, and has been since August 31, 1958, 10 cents, with tickets sold in units of 10 for $1.00 or 20 for $2.00. Had this appeal been brought by or on behalf of school children, appellee does not believe the District Court or this Court would seriously entertain an appeal from persons claiming to be affected by that portion of the order dealing with school fares. Obviously,

it remains exactly the same as it was before. If school children, for whatever reason, fail to obtain tickets in units of 10 for $1.00 or 20 for $2.00 and desire to utilize public transportation on the vehicles of the Company, they must of necessity forego the benefits of the school fare authorized and pay the adult fare. The analogy to be drawn is that no reasonable distinction can be made between the conceded facts in this case and those of the illustration. The transit rider is not affected by the Order of the Commission, except as a result of his own election.

CONCLUSION

The Order of the District Court of the United States, dated September 15, 1960, dismissing the appeal from an Order of the Public Utilities Commission should be affirmed.

Respectfully submitted,

CHESTER H. GRAY
General Counsel

GEORGE F. DONNELLA
Counsel

ANDREW G. CONLYN
Counsel

Attorneys for Appellee
Public Utilities Commission
District of Columbia
District Building
Washington 4, D. C.

146

REPLY BRIEF OF APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 19 1960

Joseph W. Stewart
CLERK

No. 15,999

Leonard N. Bebchick, and
Leonard S. Goodman

Appellants

vs.

Public Utilities Commission
of the District of Columbia,
and
D. C. Transit System, Inc.

Appellees

APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

Leonard N. Bebchick
Suite 400
1632 K Street, N.W.
Washington 6, D.C.

Leonard S. Goodman
4336 River Road, N.W.
Washington 16, D.C.

Attorneys pro se

SUBJECT INDEX

SUPPLEMENTARY ARGUMENT 1

I. APPELLANTS ARE PERSONS AFFECTED BY THE ORDER OF THE COMMISSION PERMITTING AN INCREASE IN TRANSIT FARES 1

II. THE COURT BELOW POSSESSES AN INDEPENDENT JURISDICTION TO DETERMINE APPELLANTS' CAPACITY TO SUE ON THE BASIS OF ALL THE EVIDENCE BEFORE IT INCLUDING APPELLANTS' UNCONTROVERTED AFFIDAVITS 3

III. THE COURT BELOW DID NOT EXERCISE AN INDEPENDENT JURISDICTION TO DETERMINE ON THE BASIS OF ALL THE EVIDENCE BEFORE IT WHETHER APPELLANTS POSSESSED CAPACITY OR STANDING TO SUE. 5

IV. THE COMMISSION'S MOTION TO DISMISS RAISED A QUESTION OF APPELLANTS' CAPACITY TO SUE AND THUS WAS NOT PROPERLY RAISED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE 7

CONCLUSION 10

CASES

Associated Industries v. Ickes, 134 F.2d 694 (2d Cir., 1943), vacated and remanded on other grounds, 320 U.S. 707, 64 S.Ct. 74 (1943) . . . 2

Becker v. Angle, 165 F.2d 140, 142 (10th Cir.,1947). 8

In the Matter of Phillips Petroleum Co., 10 F.P.C. 246 (1951) 2

Laughlin v. Cummings, 70 App.D.C. 192, 105 F.2d 71 (1939) 8, 9

Mansfield, C. & L. M. Rwy. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510 (1884) 8

National Capital Insurance Co. v. Jordan, 148 F. Supp. 317 (D.C.D.C., 1957) 2

Pollak v. Public Utilities Commission of the District of Columbia, 89 App.D.C. 94, 191 F.2d 450 (1951), reversed on other grounds, 343 U.S. 451, 72 S.Ct. 813 (1952) 1, 3

Quock Ting v. United States, 140 U.S. 417, 11 S.Ct. 733 (1891) 6

Seatrain Lines, Inc. v. United States, 152 F. Supp. 619 (D.C.Del., 1957) 4

Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443-45, 50 S.Ct. 220 (1930) . . . 4

United States v. Public Utilities Commission of the District of Columbia, 80 App.D.C. 227, 151 F.2d 609 (1945) 1, 3

STATUTES

Act of March 4, 1913, 37 Stat. 989, ch. 150, §8, par. 65, as amended August 27, 1935, 49 Stat. 882, ch. 742, §2, D.C. Code, Title 43, §43-705 (herein "Section 43-705") 5, 7

Act to regulate commerce of February 4, 1887 (Interstate Commerce Act), as amended, and related act
54 Stat. 915, 49 U.S.C. §17(6) 4
54 Stat. 916, 49 U.S.C. §17(9) 4
62 Stat. 931, 28 U.S.C. §1336 4

RULES

Federal Rules of Civil Procedure
Rule 9 . . . . . 8, 9
Rule 12 . . . . . 7, 9

TREATISE

2 Moore's Federal Practice (2d ed., 1948) §9.02, p. 1906, note 10 8

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Leonard N. Bebchick
and
Leonard S. Goodman

Appellants

vs.

Public Utilities Commission of
the District of Columbia, and
D. C. Transit System, Inc.

Appellees

No. 15,999

Appeal From An Order of the
United States District Court
of the District of Columbia

REPLY BRIEF OF APPELLANTS

SUPPLEMENTARY ARGUMENT

I.

APPELLANTS ARE PERSONS AFFECTED BY THE ORDER OF THE COMMISSION PERMITTING AN INCREASE IN TRANSIT FARES

It is well established that consumers of public utilities, and specifically riders of the transit system, are persons affected by an order of the Public Utilities Commission increasing the rates or fares such consumers must pay.1/ The order of the Commission appealed from increased the cash fare charged by appellee D. C. Transit System, Inc. ("Transit") from 20 to 25 cents. As a result, approximately 8 percent of the former riders of the transit system terminated their patronage of Transit and 25 percent of the remaining riders pay higher fares. Yet, appellees argue that neither consumers as a group nor the transit passengers who like appellants purchase the 25-cent cash fare are affected by the Commission's order.

The Commission's contention is premised on a most disingenuous play on words -- namely that as the effective token fare remains

---

1/ United States v. Public Utilities Commission of the District of Columbia, 80 App.D.C. 227, 151 F.2d 609 (1945); and Pollak v. Public Utilities Commission of the District of Columbia, 89 App.D.C. 94, 191 F.2d 450 (1951), reversed on other grounds, 343 U.S. 451, 72 S.Ct. 813 (1952).

20 cents (i.e. 5 tokens for $1.00), any economic disability suffered by appellants is a result of their own free choice and election, not of the Commission's order. But, the fact is that this "choice" is a creature of the Commission's action. Whereas appellants previously could ride transit vehicles by merely paying a 20-cent cash fare, they now are required to invest $1.00 in advance in order to ride at an "effective" 20-cent fare. If appellants are unable or unwilling to make such an advance investment in Transit, they may ride but only by paying a considerably higher fare. Surely that was not the same choice confronting appellants and other consumers prior to the Commission's order, nor are the consequences similar. Because appellants may be unable or unwilling to advance Transit a dollar at a time does not mean that the payment of a 20 percent increased fare represents the election of a wholly free choice which has no economic significance or consequence for them. The lesser of two evils is not to be construed as the summum bonum.

The fact is that the order of the Commission approving the new rate structure results in economic discrimination against appellants. They can ride for 20 cents only upon the observance of an economic condition which did not exist previously for cash fare riders, and which possesses marked economic impact. Further, appellants are deprived of an economic advantage they previously enjoyed in their ability to purchase a 20-cent cash fare without the necessity to invest $1.00. Although the new rate structure may not on this account be unlawful, clearly appellants are "affected" by the order of the Commission.2/ The evidence of record, moreover, supports the contention that appellants, given their circumstances, are required to and do pay a higher fare than they did prior to the Commission's order, and will be

---

2/ It is well-settled that action causing a reasonable certainty of economic injury constitutes a basis for invoking statutory review provisions applicable to aggrieved or affected persons. Associated Industries v. Ickes, 134 F.2d 694 (2d Cir., 1943), vacated and remanded on other grounds, 320 U.S. 707, 64 S.Ct. 1413 (1943). See also National Capital Insurance Co. v. Jordan, 148 F.Supp. 317 (D.C.D.C., 1957). By like reasoning, denial to any party of a reasonably certain economic advantage must also result in aggrievement. See In the Matter of Phillips Petroleum Co., 10 F.P.C. 246 (1951).

required to do so, and hence directly affected, in the future.

The Commission's position here is evocative of its unsuccessful position in the Pollak case. There the Commission argued that Pollak as a consumer had no standing to challenge its dismissal of Pollak's complaint contesting the lawfulness of using radio loudspeakers on transit vehicles. The Commission argued that the use of such loudspeakers resulted not from its order but from the election and choice of the transit company to install such equipment. But this Court recognized there, as appellants urge it to do so here, that the so-called "choice" did not spring into being full blown of its own accord, but indeed resulted from the action of the Commission. This Court found in Pollak that the negative order of the Commission directly affected the consumer.2/ Here the Commission apparently argues anew that appellants are not affected since the order in question is "negative" as it does not require appellants to do anything.

II.

THE COURT BELOW POSSESSED AN INDEPENDENT JURISDICTION TO DETERMINE APPELLANTS' CAPACITY TO SUE ON THE BASIS OF ALL THE EVIDENCE BEFORE IT INCLUDING APPELLANTS' UNCONTROVERTED AFFIDAVITS.

Appellants in their earlier brief discuss in detail the error of the Court below in failing to exercise an independent jurisdiction in determining whether appellants were transit riders and thus possessed capacity or standing to sue. The

---

2/ In the Pollak case this Court held (191 F.2d at 454):
"'Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of "orders".' American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 408, 60 S.Ct. 300, 303, 84 L.Ed. 347. Since the appellants use the service of Transit and intervened before the Commission they are 'affected by' the Commission's order and may appeal."
In the footnote attached to the foregoing holding, this Court quoted as follows from United States v. Public Utilities Commission, 80 App.D.C. 227, 231, 151 F.2d 609, 613 (1945):
"Congress has used language, throughout the applicable Code sections, indicating an intention that consumers shall have a right to challenge the Commission's actions."

attention of the Court is particularly directed to the case of Seatrain Lines, Inc. v. United States, 152 F.Supp. 619 (D.C. Del., 1957), where a statutory three-judge court reviewed an order of the Interstate Commerce Commission. There the Court exercised an independent jurisdiction to determine Seatrain's standing to sue and relied solely upon affidavits presented to the Court by Seatrain. In discharging the function which appellants urged upon the Court below, the Court stated:

> In order to determine whether Seatrain has standing, the exact nature of the interest of Seatrain in the exemption order must first be ascertained. The interest must be found in the record, specifically, the complaint and the affidavit accompanying Seatrain's motion for a temporary restraining order. . . . [at 622]
> . . .If standing is to be found, it must arise from allegations contained in the affidavit of an officer of Seatrain. [at 623]

It should be noted that the suit in the Seatrain case was brought pursuant to a general statutory grant of jurisdictional power to review orders of the Commission (62 Stat. 931, 28 U.S.C. §1336). A similar grant of subject matter jurisdiction is involved herein. Furthermore, the suit in Seatrain could be brought only after a petition for reconsideration had been acted upon by the Commission (54 Stat. 916, 49 U.S.C. §17(9)), and only a party to the administrative proceeding could seek such reconsideration (54 Stat. 915, 49 U.S.C. §17(6)).

As was the case in Seatrain, judicial review of ICC orders is limited to errors of law affecting the merits, and such review on the merits is limited to the record made before the agency. See also Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443-45, 50 S.Ct. 220 (1930). Yet, obviously none of these several factors inhibited the Court in the Seatrain case from exercising an independent jurisdiction to determine petitioner's capacity or standing to bring the action.

The Commission in the present case stolidly continues to assert as it did in the Court below, that this question of appellants' standing must be determined from the record made before the Commission. It nowhere attempts to meet appellants' argument on brief. Rather, it relies exclusively upon the statutory language of Section 43-705 that no new or additional evidence shall be received on the appeal.

Appellants submit that the language relied upon by the Commission in Section 43-705 relates entirely to the merits on appeal and not to whether appellants may come into court under the statute. The section merely codifies a rule which would apply in any event.

III.

THE COURT BELOW DID NOT EXERCISE AN INDEPENDENT JURISDICTION TO DETERMINE ON THE BASIS OF ALL THE EVIDENCE BEFORE IT WHETHER APPELLANTS POSSESSED CAPACITY OR STANDING TO SUE.

Contrary to the Commission's consistent position throughout the course of this appeal, Transit attempts to argue that the Court below did in fact weigh all the evidence before it, including appellants' affidavits in Court, and concluded from all the evidence that appellants did not have standing. Transit's argument is contrary to the findings and conclusions appearing on the face of the Court's order of September 15, 1960. (JA 19-20). The Court clearly states it considered:

1. motion of the plaintiffs for summary judgment on their appeal,
2. motion of the defendant Transit for summary judgment on its counterclaim,
3. motion of the Commission to dismiss the complaint,
4. points and authorities in support of and in opposition to said motions,
5. the pleadings in the case,
6. the certified record of the proceedings had before the Commission, and
7. oral argument of the parties on the 7th and 8th days of September, 1960.

The order clearly omits any mention of the affidavits (JA 18-

19) filed in Court by the appellants.4/

Moreover, the Court's order also plainly states the only basis for its decision.(JA 20):

> "it appearing to the Court that the record certified to the Court contains no evidence to support the plaintiffs' allegation that they are riders of transit vehicles or are persons affected by the Order of the Commission appealed from, that, accordingly, within the purview of the statute governing review of orders of the Commission, the plaintiffs are without standing to bring this appeal . . ." /Emphasis added/

Thus, it is clear that the basis for the Court's opinion that the appellants were without standing was its belief there was no evidence of record before the Commission showing appellants had the requisite standing or capacity; accordingly, the Court did not consider the uncontested affidavits filed by appellants in the Court.5/

If any further doubt should exist that the foregoing was the basis for the opinion of the Court below, it can be dispelled also by noting that the Commission's motion to dismiss was plainly premised on the allegation that the record before the Commission contained no evidence of appellants' standing. The Commission argued in its motion at pages 3 and 4:

> "the statute governing review of orders and decisions of the Commission requires that any appeal must be heard upon the record before the Commission (Par. 65, Sec. 705) and there is no evidence of record (Tr. passim) to support plaintiffs' assertion that they ride vehicles of transit or that they are in any way affected by the schedule of rates authorized by the Commission."

In accordance with this argument, counsel for the Commission

4/ In contending that the evidence before the Court did not indicate that appellants were transit riders, Transit focuses only upon appellants' affidavits presented to the Court, the contents of which it distorts. But Transit nowhere attempts to answer appellants' additional contention that the record before the Commission itself contained abundant evidence and findings of appellants' status as transit riders.

5/ Appellants submit that Transit miscites Quock Ting v. United States, 140 U.S. 417, 11 S.Ct. 733 (1891), for the proposition that uncontested affidavits are not controlling. This case involved a question of the citizenship of a petitioner of habeas corpus of Chinese parentage. The Court held that the court below was not bound by the testimony of the petitioner and his relatives because of the "inherent improbability" of their statements; but that in any event, since much of the testimony was oral, "the court below had the witnesses before it, and could thus better judge of the credibility to which they were entitled." (140 U.S. at 422).

drafted the Court's order in which the Court limited itself to the record before the Commission.

IV.

THE COMMISSION'S MOTION TO DISMISS RAISED A QUESTION OF APPELLANTS' CAPACITY TO SUE AND THUS WAS NOT PROPERLY RAISED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

Appellees apparently admit that if the question of whether appellants are transit riders and thus have standing to sue is a question of appellants' capacity to sue, the objection raised by the Commission in its Motion to Dismiss was improper under the Federal Rules of Civil Procedure. Appellees, however, contend that the issue is one of jurisdiction and thus can be properly brought to the Court's attention at any time. But this, of course, is true only of those jurisdictional questions which relate to the Court's jurisdiction over the subject matter. Rule 12(h) provides that the only jurisdictional question not waived by timely pleading is that of jurisdiction over the subject matter. Appellees fail to demonstrate that the question of whether appellants are transit riders and have standing is one concerning jurisdiction over the subject matter.

Section 43-705 of the District of Columbia Code clearly gives the Court below a broad grant of jurisdiction over the subject matter of this suit. It provides in part: "The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission . . ." The statute then indicates which parties possess the capacity to bring to the Court a matter over which the statute gives it subject matter jurisdiction. This indication of the proper parties is no different, for example, from a specification of who possesses the capacity to institute a wrongful death action.

On the other hand, in diversity cases the jurisdiction of the court arises solely from the citizenship of the parties. Thus, in diversity cases a particular aspect of the status

of an individual or corporation gives the court its jurisdiction over the subject matter. Becker v. Anglo, 165 F.2d 140, 142 (10th Cir., 1947). But in the instant proceeding, the statute confers jurisdiction over a particular type of subject matter.regardless of the status of those bringing suit. Because a particular aspect of individual or corporate status provides jurisdiction over the subject matter in diversity cases,[6/] one cannot conclude that all aspects of individual or corporate status in all cases relate to subject matter jurisdiction.

The case of Mansfield, C. & L. M. Rwy. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510 (1884), cited by Transit, involved a failureof plaintiffs to showdiversity of citizenship, so that it was a case to which the judicial power of the United States did not extend. The question there was not whether plaintiff was a citizen, but of which State the plaintiff was a citizen; there was no question of plaintiff's capacity as a citizen, but again whether the Court had the required subject matter jurisdiction of the parties. The difficulty with Transit's reasoning is that it compels the conclusion that issues of individual status almost never raise an issue of capacity. Transit -- even more than merely confusing the present question with the diversity problem -- would read Rule 9 practically out of existence.

Transit further confuses jurisdiction of the person with jurisdiction over the subject matter. Laughlin v. Cummings, 70 App.D.C. 192, 105 F.2d 71 (1939), also cited by Transit,

---

6/ Professor Moore further demonstrates the distinction between a question of capacity and one of jurisdiction of the subject matter. Where jurisdiction is predicated upon diversity and one of the parties is alleged to be a corporation:

> "Here capacity and jurisdiction are parts of the same problem. On the other hand, if the defendant does not desire to challenge the fact that there is a corporation and hence corporate capacity, but only wishes to deny that the company is incorporated in the state alleged, and thus put in issue only the jurisdictional allegation, Rule 8(d), supra, authorizes the use of a general denial, if all plaintiff's averments can be challenged honestly."

2 Moore's Federal Practice (2d ed., 1948) §9.02, p.1906, note 10.

clearly shows this error. The appellant in the Laughlin case sought an injunction against the Warden of the Atlanta Penitentiary in the District Court of the District of Columbia. The Court on appeal rightly held that "The courts of the district have no jurisdiction over the action of the Warden," a resident of Georgia, and hence there was no jurisdiction of the person. Moreover, in that case, jurisdiction was denied by the appellees in their first pleading, that is in their answer to the rule to show cause issued on the bill for an injunction; the provisions of Rule 9 of the Federal Rules were not in issue.

The Commission, on theother hand, mistakenly relies upon analogies to acts which must be performed under the statute prior to bringing suit to show that the question of whether appellants are transit riders and thus possess the capacity to sue relates to the Court's jurisdiction over the subject matter of the appeal. But, the requirements that a suit be timely instituted and that administrative remedies be exhausted are hardly analogous. The issue here is the appellants capacity to seek review of a Commission order over which the Court below has been given subject matter jurisdiction.

None of the authorities cited by appellees demonstrate that the issue before the Court is one of jurisdiction of the subject matter. Yet the motion of the Commission to dismiss would be proper only if that were the case. Otherwise, the issue which the motion seeks to raise has been waived under Rule 12(h) and the Court below erred in granting such motion.